Supreme Court, U.S.
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No. 96-1717

In the Supreme Court of the United States

OCTOBER TERM, 1996

FREE AIR CORPORATION, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's application for a broadcast license was properly dismissed because petitioner failed to comply with the scheduling order and failed to appear at the hearing on the merits.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Comuni-Centre Broadcasting, Inc. v. *FCC*, 856 F.2d 1551 (D.C. Cir.), cert. denied, 489 U.S. 1083 (1988)	4, 7
GAF Broadcasting Co., 96 F.C.C.2d 411 (Rev. Bd. 1984)	5
H.S. Communications, Inc., 6 FCC Rcd 3609 (Rev. Bd. 1991)	7
National Hockey League v. *Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976)	6-7
Rem Malloy Broadcasting, 9 FCC Rcd 4822 (Rev. Bd. 1994)	2
Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. *Rogers*, 357 U.S. 197 (1958)	8
Tiffany Fine Arts, Inc. v. *United States*, 469 U.S. 310	8
Vue-Metrics, Inc., 69 F.C.C.2d 1049 (1978), aff'd, 615 F.2d 1369 (D.C. Cir. 1980)	7

Regulation:

47 C.F.R. 73.3568(b)	7

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OPINIONS BELOW

The orders of the court of appeals (Pet. App. 33a-34a, 35a) are unreported. The decision of the administrative law judge dismissing petitioner's application (Pet. App. 11a) is unreported. The decisions of the Review Board and of the Federal Communications Commission affirming that dismissal (Pet. App. 21a-29a, 30a-32a) are reported at 10 FCC Rcd 4974 and 10 FCC Rcd 9502.

JURISDICTION

The orders of the court of appeals were entered on May 22 and August 28, 1996. A petition for rehearing was denied on January 28, 1997 (Pet. App. 36a). The petition for a writ of certiorari was filed on April 28, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was one of fifteen applicants for a license to operate a new FM radio station in Raleigh, North Carolina. These applications were designated for a comparative evidentiary hearing in 1988. In 1994, the administrative law judge (ALJ) was directed by the Commission's Review Board to conduct proceedings to determine petitioner's financial qualifications to receive and operate the license. *Rem Malloy Broadcasting*, 9 FCC Rcd 4822, 4827-4830 (Rev. Bd. 1994), petition for extraordinary relief dismissed, 10 FCC Rcd 503 (1995).

The procedural schedule established by the ALJ specified that discovery was to be completed by November 1, 1994, and that petitioner's direct written case was to be exchanged with opposing counsel by November 14, 1994 (Pet. App. 12a). The ALJ modified the procedural schedule on November 2, 1994, after petitioner produced an affidavit from a physician stating that Mrs. Castellanos—one of the two principal officers of petitioner—was recovering from breast cancer surgery performed on October 17 and would not be able to appear for a deposition until the latter part of December 1994 (*id.* at 22a). Under the revised schedule, the hearing on the merits was postponed to January 30, 1995, and the deadline for completing discovery was extended to December 31, 1994 (*id.* at 1a, 11a).

On December 22, 1994, two other applicants for the license filed a joint motion for a four-month continuance, complaining that they had been unable to depose Mrs. Castellanos and that petitioner had failed to comply with document discovery requests (Pet. App. 1a). The ALJ denied the motion because these appli-

cants had not filed a notice establishing a date for the deposition of Mrs. Castellanos and had not attempted to depose other persons in her stead (*id.* at 3a).

Petitioner did not comply with the scheduling order that required all direct case exhibits to be exchanged by January 17, 1995 (Pet. App. 13a). Instead, on that date, petitioner filed a motion to delete the financial issue, asserting that it would rely on documents and affidavits submitted with that motion (*id.* at 3a, 13a-14a, 22a-23a). Petitioner submitted no current medical report to support a contention that Mrs. Castellanos would be unavailable to testify in person or by deposition. Petitioner failed to appear at the January 31 hearing on the merits (*id.* at 14a).*

The ALJ thereafter denied the motion to delete, finding that the motion was untimely and that substantial evidentiary questions existed as to the validity of petitioner's certification of its financial qualifications (Pet. App. 5a-9a). The ALJ noted that the ill-health of one of its principal officers did not excuse petitioner's failure to comply with the scheduling order requirement for the exchange of documents or petitioner's failure to appear at the hearing on the merits (*id.* at 16a). The ALJ stated that the witness's "health did not explain [petitioner's] failure to exchange its direct case" nor did it "explain [petitioner's] unwillingness to offer the testimony of other essential witnesses" (*ibid.*). The ALJ further observed that, even though petitioner asserted that one of its witnesses was ill, petitioner never sought

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* On January 30, petitioner had submitted a letter to the ALJ declaring that it would not be present at the hearing and repeating its representation that it would rest its case on the financial issue on the motion to delete (Pet. App. 14a).

a continuance of the already delayed hearing date and did not seek to supplement the initial medical report, which had indicated that a delay was needed only until the latter part of December 1994 (*id.* at 12a-13a). Against this background, the ALJ concluded that "[petitioner's] real reason for not offering evidence on the financial issue * * * [was] its unwillingness to subject its financial showing to the scrutiny of its opponents" (*id.* at 16a).

The ALJ analyzed petitioner's conduct under the standard for dismissal of agency proceedings set forth in *Comuni-Centre Broadcasting, Inc.* v. *FCC*, 856 F.2d 1551, 1554 (D.C. Cir.), cert. denied, 489 U.S. 1083 (1988). In *Comuni-Centre Broadcasting, Inc.* v. *FCC*, the court held that, among the factors to be considered in reviewing the dismissal of an applicant from a comparative proceeding, the agency should consider "the applicant's proffered justification for the failure to comply with the presiding officer's order, the prejudice suffered by other parties, the burden placed on the administrative system, and the need to punish abuse of the system and to deter future misconduct." 856 F.2d at 1554. The ALJ stated (Pet. App. 19a-20a):

> [G]iven the fact that [petitioner] has already been afforded an opportunity to come forward with the evidence to meet its burden on the issue added by the Board, which it has spurned, burdening the administrative system further with its application would be an unconscionable waste of the Commission's time and resources. Also, there would be manifest prejudice to [petitioner's] opponents if they were required to participate in yet another hearing session on [petitioner's] financial qualifications merely because [petitioner] defied the

> Presiding Judge's procedural order. Finally, dismissal of [petitioner's] application serves the public interest since it will have a deterrent effect on counsel who defy ALJ orders.

2. The Review Board upheld the dismissal of petitioner's application (Pet. App. 21a). The Board concluded that the asserted health problems of one of petitioner's witnesses did not justify its failure to exchange its direct evidence on the financial issue or to appear at the scheduled hearing on the merits (*id.* at 25a-26a). The Board distinguished a case cited by petitioner, *GAF Broadcasting Co.*, 96 F.C.C.2d 411 (Rev. Bd. 1984), in which the Board had held that an ALJ acted arbitrarily and capriciously in refusing to allow a continuance of a hearing after an essential witness became ill. The Board explained that, unlike the applicant in *GAF*, petitioner never sought a continuance of the January 31, 1995 hearing, never submitted an update on the condition of its witness, and did not make any attempt to pursue its application by proceeding on schedule with a substitute witness (Pet. App. 26a).

The Board rejected petitioner's claim that it would have been "futile" to ask for a continuance or to submit an affidavit from a physician. The Board noted that the ALJ had demonstrated a willingness to accommodate the health concerns of petitioner's witness by previously amending the scheduling order upon a proper application (Pet. App. 27a):

> [The ALJ] was amenable to suggestions from the parties concerning various courses of action that would resolve the financial issue * * * in an orderly and timely fashion and not jeopardize Castellanos' health. He extended his original pro-

> cedural dates by adding in the recovery time estimated by Castellanos' physician before she could be deposed. He suggested that the parties contact Castellanos' physician to determine when it would be permissible to take Castellanos' deposition and recommended they might be able to minimize the time and burden of the deposition by deposing Castellanos at her Florida home. Tr. 2522-2523. He asked the parties for their views about commencing the hearing toward the end of January or early February 1995 and received no objection from counsel for [petitioner].

The Board noted that petitioner had failed to explain why it could not exchange its direct case or offer the testimony of other witnesses at the scheduled hearing (*id.* at 26a-28a).

The Commission affirmed the dismissal of the application for the reasons stated by the Review Board (Pet. App. 30a).

3. In an unpublished decision, the court of appeals affirmed the Commission's decision "substantially for the reasons stated in the Review Board's order * * * and the [administrative law judge's] order" (Pet. App. 33a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

The sanction of dismissal is appropriate for a party's failure to comply with a scheduling order and its failure to attend the hearing on the merits of the case. Dismissal is an appropriate means of punishing and deterring misconduct by litigants. *National*

Hockey League v. *Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642-643 (1976) (per curiam). The rules of the Commission plainly warn that "failure to prosecute an application * * * will be cause for dismissal" (Pet. App. 15a, citing 47 C.F.R. 73.3568(b)). The decisions of the Commission dismissing applications under this rule for failure to prosecute have consistently been upheld when, as here, the applicant failed to comply with discovery requests or with scheduling orders. See, *e.g.*, *Comuni-Centre* v. *Broadcasting, Inc.* v. *FCC*, 856 F.2d at 1554 (upholding dismissal for filing pleading twelve days after ALJ's deadline); *H.S. Communications, Inc.*, 6 FCC Rcd. 3609 (Rev. Bd. 1991) (application dismissed for failure to exchange direct case as scheduled and failure of a principal to appear at deposition); *Vue-Metrics, Inc.*, 69 F.C.C. 2d 1049, 1050 (1978), aff'd, 615 F.2d 1369 (D.C. Cir. 1980) (Table) (application dismissed for failure to comply with discovery requests).

The dismissal of petitioner's application for failure to prosecute was proper in this case. Contrary to petitioner's contentions (Pet. 18), the ALJ was not insensitive to the possible impact of the medical condition of petitioner's witness on its ability to prosecute the application. Indeed, after receiving an affidavit from the witness's physician averring that she would not be able to be deposed until the latter part of December 1994, the ALJ granted a two month extension of the deadline for completing discovery until December 31, 1994 (Pet. App. 2a). Petitioner never produced further affidavits indicating that her physical condition required any additional delay (*id.* at 3a). Nor did petitioner move for a continuance of the scheduled hearing on the merits. Instead, petitioner simply failed to attend (*id.* at 14a).

The Review Board carefully and thoroughly considered and rejected petitioner's factual contention (Pet. App. 27a). The court of appeals adopted the findings of the Board (*id.* at 33a). Further review of these factual determinations, concurred in by both tribunals below, is not warranted. See *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 317-318 n.5 (1985).

Not only did petitioner fail to make its principal witness available, it also refused to offer evidence from other sources on the financial issue against it. Petitioner's proffered motion to delete raised additional questions about its financial condition (Pet. App. 8a). The ALJ's finding that petitioner's failure to prosecute its application at the scheduled hearing stemmed from its "unwillingness to subject its financial showing to the scrutiny" of the opposing applicants (*id.* at 16a) finds ample support in the record.

Petitioner errs in relying (Pet. 12) on *Societe Internationale pour Participations Industrielles et Commerciales, S.A.* v. *Rogers*, 357 U.S. 197 (1958). The Court in *Rogers* held that the sanction of dismissal was inappropriate when a party failed to obey a discovery order "due to inability, and not to willfulness, bad faith, or any fault of petitioner." *Id.* at 212. Petitioner's failure to comply with the scheduling order, and its failure to attend the hearing on the merits, resulted from its willful decision, not from inability. This factual determination, reached by the agency and affirmed by the court of appeals, does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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